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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 206

D'OENCH, DUHME & CO., INC.,
Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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Counsel for Petitioner.

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT.

Petitioner, in the belief that the questions here for decision were succinctly stated in its Petition for Certiorari, its supporting and reply briefs, had not intended filing any further brief herein, however, on January 6, 1942, respondent filed its 62-page brief, copy of which petitioner received on January 7, 1942. The petitioner, feeling that respondent's brief has incorrectly stated some of the facts, has overlooked at least one of petitioner's principal points and has misconceived much of the Missouri law it has cited, has prepared this short reply brief.

I.

Respondent has attempted to excuse the error of the court below in admittedly failing to apply the Missouri con-

flicts of law rule by asserting that the error was "harmless," claiming that the court below actually applied the same rule that a Missouri court would have applied. This bold assertion overlooks the fact that petitioner insists that under the Missouri rule of conflicts of law the renewal note sued on would be construed to be a Missouri contract and subject to all of the defenses urged by petitioner. See *Hansen* v. *Duvall*, 62 S. W. (2d) 732 (Mo. Sup.) *l. c.* 738, and cases cited in petitioner's reply to respondent's brief in opposition to Petition for Certiorari, p. 2. This rule has just been reaffirmed by the Springfield Court of Appeals on November 19, 1941, in *Federal Chemical Co.* v. *Witt*, 155 S. W. (2d) 897, *l. c.* 902 (advance sheets) where the court said "a renewal of a note issued for accommodation is subject to the same defense as the original note (citing Missouri cases)."

Respondent also confuses the issue with respect to the Missouri law by saying that the original notes were delivered to the payee in Belleville, Illinois (Resp. brief, p. 4). Actually the testimony does not support such statement (See R. 48, where the only evidence on the matter shows that it was unknown where or how the original note was delivered). However, even if the note had been delivered in Illinois it would still have remained a Missouri contract. *Smoot* v. *Judd*, 161 Mo. 673.

Further respondent states that the court below found it to be "a holder in due course." What the court actually held was that respondent occupied a position *under the Illinois law* "equivalent to a holder in due course." (Italics supplied.)

II

Respondent's brief in discussing the question of judicial notice has failed to meet petitioner's argument that a ques-

tion of substantive law is involved. Furthermore, in its discussion of the applicability of the *Erie* case it has disregarded the basic principle therein announced, namely, that there is no Federal general common law and that previous creation of such a body of law was beyond the constitutional power of the Federal courts.

That the law of judicial notice is part of the substantive law seems to flow from Mr. Justice Holmes admirable dissenting opinion in *Black & White Taxicab* v. *Brown & Yellow Taxicab*, 276 U. S. 518, for there he said that general law means "matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law."

It is obvious that the question of judicial notice is not governed by a law of the United States.

R. S. Mo. 1929, sec. 806 cited by respondent (Resp. brief p. 1) is simply a rule of evidence dispensing with proof of a foreign law *only if it is pleaded*. Clearly it is not a rule of pleading as respondent seems to argue. While it could be argued that under the new Federal Rules of Procedure it would not be necessary to plead a foreign law but that would not eliminate the common law requirement of Missouri that it must be proved if not pleaded. The situation is analogous to the contributory negligence cases. The State substantive law is still applicable and must be applied irrespective of the pleading requirements of the Rules of Civil Procedure.

III.

It is interesting to note that respondent in its brief has totally omitted any reference to question 3 presented by the Petition for Certiorari (Pet. p. 5); namely, that Illinois law could never be applied in this case because said law as

determined by the court below is repugnant to the settled current of the Missouri decisions and statutes. This omission is understandable in light of the failure of the court below to consider the point based upon Missouri decisions and in light of the authoritative subsequent decision of this Court in *Griffin* v. *McCoach*, 313 U. S. 498, requiring Federal Courts to respect and apply the forum law in all conflicts cases where the foreign law (if it would otherwise be applied by the forum) is repugnant to that of the forum.

It cannot be controverted that the Missouri Statute (R. S. 1939 sec. 3044) makes "absense or failure of consideration (is) a matter of defense as against any person not a holder in due course * * *". Iowa has a similar statute and the Missouri Supreme Court in *Ruhe* v. *Buck*, 124 Mo. 178 bodily adopted the rule stated in *William* v. *Haines*, 27 Iowa 251. That case was an action on a sealed instrument executed in Maryland. Under Maryland law the consideration could not be required into but the Iowa status provided that the want or failure in whole or in part of the consideration of a written contract might be shown as a defense. The court held that the consideration could be impeached in an action in Iowa saying "the plaintiff must take such remedy as our laws afford him. He has not a vested right in the courts of other States to all the common law incidents of contracts, provided the obligation be not impaired." The Missouri rule as stated in the syllabus of the case said "the spirit of comity does not require that a non-resident shall be allowed a remedy which is by the policy of the State law denied to its own citizens."

Furthermore in the recent case of *Federal Chemical Co.* v. *Hitt*, *supra*, the Missouri court said "the fact, if a fact, that the maker of a note signed the note merely as an accommodation to the named payee is *always* a defense against the payee or anyone taking from the payee after maturity

of said note." (Italics supplied.) *See also: Chicago Title & Trust Co.* v. *Brady*, 165 Mo. 197, and *Farmers Bank* v. *Harris*, 250 S. W. 946 (Mo. app.)

IV.

Respondent's estoppel theory is wholly without merit either under the Federal or Illinois law. Respondent's brief fails to disclose that at the trial petitioner moved to strike respondent's reply pleading estoppel (R. 9).

In the first place the acts claimed to constitute estoppel occurred before the Federal Act cited by respondent was passed and before the beginning of the corporate existence of the respondent. Furthermore the Bank remained solvent for more than five years after the note sued on was given and for more than three years after it was charged off by the Bank. The note showed on its face that it was non-negotiable and at the time the Bank closed was in default of ten semi-annual interest payments and in default as to principal. (This, under Missouri law charged respondent with notice of defenses.) Furthermore, although it was executed by a duly licensed brokerage house, a member of the St. Louis Stock Exchange, the Bank, three years prior to its failure and while still solvent, had charged the note off (although it was apparently a good and collectible note unless it was subject to some defense). It was probably charged off at the suggestion of the respondent and certainly with its knowledge.

Under these facts petitioner can hardly see how it could be seriously urged that estoppel should apply. Furthermore respondent's own witness testified that even if the note had not been in the Bank they would still have insured and otherwise handled the matter as they did when the Bank failed (R. 62, 63).

Obviously respondent was not damaged. The asserted estoppel is wholly without substance.

Respectfully submitted,

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